Citation: R v Tanner, 2024 MBCA 87
Date: 20241106
Docket: AR24-30-10067

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Christopher J. Mainella
Madam Justice Jennifer A. Pfuetzner
Mr. Justice David J. Kroft

B E T W E E N:

	)	***O. G. Plotnik*** *and*
	)	***A. McKenzie***
HIS MAJESTY THE KING	)	*for the Appellant*
	)	
Respondent	)	***R. Lagimodiere*** *and*
	)	***A. C. Smith***
- and -	)	*for the Respondent*
	)	
RAMONA JOAN TANNER	)	*Appeal heard and*
	)	*Decision pronounced:*
(Accused) Appellant	)	***October 23, 2024***
	)	
	)	*Written reasons:*
	)	***November 6, 2024***

PFUETZNER JA (for the Court):

[1] The accused appealed her conviction for manslaughter in the death of her son-in-law (the victim) and sought leave to appeal and, if granted, to appeal her sentence of five years in prison.

[2] She raised several grounds of appeal, including that the trial judge erred in her credibility findings; misapprehended the evidence of a Crown witness; erred in her application of the *W(D)* framework (see *R v W(D)*, [1991] 1 SCR 742, 1991 CanLII 93 (SCC)); erred in her application of the

self-defence provisions of the *Criminal Code*, RSC 1985, c C-46 (the *Code*); and imposed a demonstrably unfit sentence.

[3] At the hearing, we allowed the appeal on the ground that the trial judge erred in her application of sections 34(1)(c) and 34(2)(b) of the *Code*, set aside the conviction and ordered a new trial, with reasons to follow. These are those reasons.

Background

[4] The circumstances of the offence are that the victim spent the day of his birthday celebrating with his partner, Summer Duvall (Summer), his mother, Mary Thompson (Mary), and the accused, who is Summer's mother. The historic relationship between the accused and the victim was fractious and marked by periodic arguments and physical fights after which they would make up.

[5] While attending a house party, the accused saw the victim with another woman and accused him of cheating on Summer. The victim returned to the home that he shared with Summer and their young son. The accused and Mary eventually returned to the home as well. The victim, Mary and the accused were all intoxicated.

[6] Summer awoke to the sound of arguing in the kitchen and learned of the accused's allegations of infidelity. The argument between the accused and the victim escalated and they began pushing and shoving each other. The victim struck the accused multiple times on the forehead with a telephone receiver after she tried to call police, causing a cut to her forehead and bleeding. They wrestled to the floor, where the accused got on top of the

victim and punched him. After Summer left the house with her son, the fight stopped momentarily. The accused stood in a corner in the home's small kitchen and the victim sat briefly on a stool in the kitchen about two or three steps from her. Mary was nearby. The victim then stood up and approached the accused without saying anything. In her testimony, Mary described the victim as making a "little" motion as if he was going to hit the accused.

[7] The accused took a knife from the kitchen and stabbed the victim once in the chest and he collapsed. The accused immediately apologized, phoned 911 and began performing CPR on the victim. He died from a twelve-centimeter-deep stab wound to his left chest.

The Trial

[8] The Crown's witnesses included Summer and Mary. The accused testified in her own defence. The trial judge accepted Summer's evidence; however, she was not present in the final moments leading up to the stabbing. There were inconsistencies between the evidence of the accused and of Mary. The accused testified that she had no memory of stabbing the victim. The trial judge did not find the accused credible and rejected most of her evidence, as she was entitled to do.

[9] At trial, the accused's position was that she should be acquitted of manslaughter pursuant to section 34(1) of the *Code* as she was acting in self-defence when she stabbed the victim.

[10] The Crown conceded, and the trial judge agreed, that it could not disprove the first two requirements of self-defence. Accordingly, the trial judge accepted that the accused believed on reasonable grounds that a threat

of force was being made against her by the victim and that the act of stabbing the victim was committed for the purpose of defending or protecting herself from the victim (see the *Code*, ss 34(1)(a)-(b)).

[11] The primary issue at trial was whether the Crown had disproved the third element of self-defence under section 34(1)(c) of the *Code* beyond a reasonable doubt—that the act of stabbing the victim was reasonable in the circumstances (see *R v Khill*, 2021 SCC 37 at para 37 [*Khill*]).

[12] In assessing the third element of self-defence, the trial judge considered the relevant factors listed in section 34(2) of the *Code*. The primary issue on the appeal is her application of the factor in section 34(2)(b), which states:

Factors **34(2)** In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors: **(b)** the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;	**Facteurs** **34(2)** Pour décider si la personne a agi de façon raisonnable dans les circonstances, le tribunal tient compte des faits pertinents dans la situation personnelle de la personne et celle des autres parties, de même que des faits pertinents de l'acte, ce qui comprend notamment les facteurs suivants: **b)** la mesure dans laquelle l'emploi de la force était imminent et l'existence d'autres moyens pour parer à son emploi éventuel;

[13] In analyzing this factor, the trial judge made the following findings:

> While the use of force may have been imminent, I am satisfied that there were other means available to respond to the potential use of force. The kitchen area was small, and the L-shaped corner was close to the door exiting to the garage. [The accused] could have attempted to leave the area. She also could have simply threatened to use the knife in an effort to have [the victim] stop his approach.
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> . . .
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> Further, the evidence is clear that prior to the stabbing, the altercation had stopped. Even on [the accused's] own evidence, [the victim] had gotten up and went to the phone by the island. He had disengaged. Again, there was an opportunity for [the accused], who was allegedly afraid, to exit the house or take other evasive action.

Analysis

[14] In our view, the trial judge failed to apply three relevant legal principles in her application of section 34(2)(b) of the *Code*, resulting in a material legal error.

[15] First, that an accused under threat is not required to retreat in order to avail themselves of the self-defence provisions of the *Code*. The failure to retreat is, however, a factor for consideration under section 34(2)(b) (see *Khill* at para 90). Moreover, despite the trial judge's finding that the accused "could have attempted to leave the area", the uncontroverted evidence was that the accused was effectively backed into a corner by the victim in a very small kitchen when he unexpectedly advanced towards her from about six feet away. In our view, the prospect of escape was not a realistic option.

[16] The second principle is that, in responding to an imminent threat, an accused person is not required to precisely calculate their response or "'weigh to a nicety' the exact measure of a defensive action or to stop and reflect upon

the risk of deadly consequences from such action" (*R v Kong*, 2005 ABCA 255 at para 208, Wittman JA, dissenting, rev'd 2006 SCC 40 [*Kong*]; see also *R v Paul*, 2020 ONCA 259 at para 25). Also, an accused is entitled to make a reasonable mistake about the nature and extent of force necessary to defend themself (see *Kong* at para 209).

[17] In the present case, the trial judge expected a nuanced and finely calibrated response from the accused in a split-second reaction to an unexpected aggressive act of the victim—finding that she could have brandished the knife in an effort to stop the victim's approach. To be sure, the existence of other potential reasonable responses available to the accused is relevant. However, the ultimate assessment is whether the force actually used by the accused was reasonable in the circumstances—not whether the accused used the least amount of force reasonably possible.

[18] Finally, the trial judge erred in principle in finding that the accused should have left the house *prior* to the victim advancing on her. This assumes that the accused should have predicted that, after disengaging from the conflict, the victim would suddenly approach her in a threatening manner.

[19] The trial judge failed to consider that section 34(2)(b) of the *Code* is "temporally bounded by the force or threat of force that motivated the accused to act on one end and their subsequent response on the other" (*Khill* at para 82). The analysis under section 34(2)(b) of "what alternatives the accused could have pursued instead of the act underlying the offence, such as retreat or less harmful measures", must be undertaken "relative to the imminence of the threat" (*Khill* at para 82). Justice Martin further explains

that this factor asks "the trier of fact to weigh the accused's response once the perceived threat has materialized" (*ibid*).

[20] In our view, the trial judge erred in law by failing to properly apply these principles. While the Crown mentioned section 686(1)(b)(iii) of the *Code* in passing in oral argument, it was not seriously advanced as a reason to dismiss the appeal despite a misdirection in law. Clearly, no single factor under section 34(2) of the *Code* "is necessarily determinative of the outcome" (*Khill* at para 69). However, we cannot say that the verdict would have been the same if the trial judge had not erred in law in how she dealt with section 34(2)(b) of the *Code*. A new trial is required.

[21] In light of our conclusion that a new trial must be ordered due to errors in the application of the self-defence provisions of the *Code*, there is no need to consider the other grounds of appeal or the sentence appeal.

Conclusion

[22] For these reasons, we allowed the appeal, set aside the conviction for manslaughter and ordered a new trial.

Pfuetzner JA

Mainella JA

Kroft JA